87-500

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT M. STEPHENS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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62 pp

QUESTIONS PRESENTED

1. The Trial Court's disqualification of Petitioner's lawyers denied him his right to counsel of his choice as he is entitled pursuant to the Sixth Amendment to the Constitution.

2. The Circuit Court failed to address the issue of the wrongful disqualification of Petitioner's attorney of his choice, Vincent D. Callahan.

3. The Trial Court erred in denying Petitioner's Motion for Vindictive and Selective Prosecution and therefore was denied his right to due process of law.

4. The Trial Court erred in denying Petitioner's Rule 29 Motion of Judgment of acquittal for the reason that the Government failed to prove the use of interstate commerce.

5. The Trial Court punished the Petitioner for exercising his Constitutional right to trial by imposing a sentence of confinement in gross disparity to his Co-Defendants.

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT M. STEPHENS, by and through his attorney of record, **RONALD P. GUYER**, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-) is reported at F.2d

JURISDICTION

The judgment of the Court of Appeals (App. A, infra, 1a-) was entered on May 19, 1987 and Suggestion of Rehearing was denied June 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law...

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense.

STATMENT OF THE CASE

Course of Proceedings Below:

Petitioner, **ROBERT M. STEPHENS,** together with HARRY CLIFFORD GEYER, III, GEORGIA CAROL DONALSON and SHARON PADIA were charged in a twenty-one Count Indictment with the offenses of conspiracy to facilitate in interstate commerce with intent to promote an unlawful activity, aggravated promotion of prostitution and promotion of prostitution and prostitution in violation of State Statutes including Texas Penal Code, Section 43.04, 43.03, and 43.02 (V.A.P.C.) in violation of Title 18, United States Code, Section 18, Section 371 and 18, U.S.C. 1952. The remaining Counts of the Indictment, Counts Two through Twenty-one charged each of the four Defendants with the use of a facility in interstate commerce, being either "VISA bank credit card system" and/or "Mastercard credit card system" and the use of United States Mail with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment or carrying on of an unlawful activity, to wit, aggravated promotion of prostitution and promotion of prostitution and prostitution in violation of State statutes including Texas Penal Code, Section 43.04, 43.03, and 43.02 (V.A.T.C.) in violation of 18, United States Code, Section 1952. Each of the Counts, being Count Two through Twenty-one read the same but for the date of the transaction, and the credit card. On October 16, 1985, the Government moved to dismiss Counts Eighteen and Nineteen of the original Indictment as to **ROBERT MORRIS STEPHENS** and the Court so Ordered the dismissal.

Jury selection was begun on the remaining Counts of the Indictment

dictment November 5, 1985 and on November 21, 1985 the Government moved to dismiss in open Court, Counts Nine through Fifteen. On November 25, 1985, the jury reached a verdict as to the remaining Counts of the Indictment, Counts One through Eight, Sixteen and Seventeen, and Twenty and Twenty-one wherein the jury found the Petitioner guilty of the offenses charged.

On April 15, 1986, five months after the jury's verdict, the Petitioner was sentenced to eight years in prison to be followed by five years probation together with a fine of $5,000.00 on the Counts of the Indictment.

On April 16, 1986, timely written Notice of Appeal was filed together with a Motion for Bail Pending Appeal. On June 24, 1986, the Court granted Bond pending appeal.

Petitioner remains on bail pending this appeal.

STATMENT OF FACTS

Disqualification of Counsel

The Indictment of the case was returned May 14, 1984, a bench warrant issued the same day. [R. Document 1 and 2] On May 18, 1984, Petitioner, **ROBERT M. STEPHENS,** turned himself in and was admitted to $50,000, ten percent (10%) Bond. At this time, Petitioner, **ROBERT M. STEPHENS,** was accompanied by attorney, **TERRENCE W. McDONALD.** [R. Proceeding] On May 24, 1984, Petitioner filed his Waiver of Personal Appearance at Arraignment and entry of plea of not quilty. **TERRENCE W. McDONALD** signed as attorney for Defendant. [R. Document 6] On June 11, 1984, Pre-Trial Motions were filed on behalf of Petitioner, **ROBERT M. STEPHENS.** [R. Documents 8-16] On June 25, 1984, the Government filed answers to Petitioner's Motions making no objection to representation by attorney, **TERRENCE W. McDONALD.** [R. Documents 21-29] On June 27, 1984, Petitioner, **ROBERT M. STEPHENS,** filed his Motion to Dismiss for Vindictive Prosecution and for Selective Prosecution. [R. Document 31 and 33]

On July 2, 1984, Petitioner, **ROBERT M. STEPHENS',** case was called at a docket call wherein he was represented by attorneys,

torneys, **TERRENCE W. McDONALD** and **RONALD P. GUYER.** No objection was made to their representation and the case was reset to August 6, 1984. [R. Docket Entry July 2, 1984] July 5, 1984, the Government filed Answers to Petitioner's Motion to Dismiss and made no objection to the representation by attorneys **TERRENCE W. McDONALD** and **RONALD P. GUYER.** [R. Docket Entry July 5, 1984] On August 6, 1984, this case was called to Pre-Trial Docket for Motion hearings and the Court heard matters concerning discovery. All Motions were taken under advisement. The Prosecution made no objection to representation by attorneys **TERRENCE W. McDONALD** and **RONALD P. GUYER.** Docket call was reset to September 17, 1984. On September 17, 1984, the instant case was called at Docket Call and oral Motions were taken under advisement for future hearing. No objection was made to representation by attorneys **TERRANCE W. McDONALD** and **RONALD P. GUYER.** On November 5, 1984, the instant case was called on the Docket Call. The Court heard a Motion to Quash subpoenas for purposes of discovery and no objection was made to representation by attorneys **TERRANCE W. McDONALD** and **RONALD P. GUYER.**

On January 17, 1985, the Government filed a Motion to Disqualify Petitioner's counsel, **TERRENCE W. McDONALD** and **RONALD P. GUYER.** On February 1, 1985, the Court heard evidence on Motion for disqualification. On February 13, 1985, the Court entered it's Order disqualifying Petitioner's chosen counsel, **TERRENCE W. McDONALD** and **RONALD P. GUYER.** The Court recorded it's Findings of Fact and Conclusions of Law in a Memorandum and Opinion. [R. Document 60] On February 13, 1985, Petitioner, **ROBERT M. STEPHENS,** was severed from Co-Defendants, HARRY CLIFFORD GEYER, III, GEORGIA DONALSON and SHARON PADIA.

Disqualifications of Attorney, Vincent D. Callahan

On March 19, 1985, Attorney, VINCENT D. CALLAHAN, filed Notice of Appearance representing Petitioner, **ROBERT M. STEPHENS.** On March 22, 1985, the Government filed a

Motion to disqualify Attorney VINCENT D. CALLAHAN due to his associations with attorneys, **TERRANCE W. McDONALD** and **RONALD P. GUYER.** On March 29, 1985, the Court held a hearing concerning disqualification of attorney VINCENT D. CALLAHAN and entered it's Order disqualifying attorney VINCENT D. CALLAHAN on April 5, 1985 filing a written Memorandum and Order. [R. Document 65]

Attorney Alan Brown Denied Access to Previous Work by Defence Counsel

On June 6, 1985, the Court entered it's Order for Petitioner, **ROBERT M. STEPHENS** to show cause on June 17, 1985 as to why his trial should not proceed without counsel. [R. Document 68] On June 17, 1985, attorney ALAN BROWN entered his Notice of Appearance for Petitioner, **ROBERT M. STEPHENS.** June 19, 1985 attorney ALAN BROWN moved in open Court to obtain certain information from files of previous attorneys of record which Motion was denied by the Court. On August 19, 1985 attorney ALAN BROWN moved for continuance for the reason that he was unprepared for trial. The Motion for Continuance was granted. On October 16, 1985, the Court heard evidence on **ROBERT M. STEPHENS'** Motion to Adopt the Hearing of Co-Defendant GEYER concerning testimony on selective and vindictive prosecution. Defendent, **ROBERT M. STEPHENS'**, Motion to Dismiss for selective prosecution and vindictive prosecution were denied by the Court October 16, 1985. On that same date attorney ALAN BROWN moved in open Court to sever the "CC Counts" which Motion was denied. On October 17, 1985 the Court filed it's Order and Memorandum concerning the denial of Defendant's Motion to Dismiss pursuant to selective and vindictive prosecution. [R. Document 82 and 83] On November 5, 1985, jury selection began.

Selective and Vindictive Prosecution

ROBERT M. STEPHENS was one of four individuals prosecuted by the United States Attorney's Office for the Western District of Texas for offences alleged under Title 18, United States Code, Section 1952, the Travel Act. Just as the other

three individuals, **ROBERT M. STEPHENS** was prosecuted in Federal Court because of his association with the Bandito Motorcycle Club. [Vol. V, p. 123-124, 133, 136] [This Conclusion is stated in the most emphatic language by Special Agent Greg Va[illegible] The purpose for singling out members of the Bandito [illegible]ycle Club and prosecuting them for that sole purpose [illegible]ted by the FBI agent in charge. Special Agent Greg Va[illegible]eLoo of the San Antonio Office of the Federal Bureau of Investigation who has been with the FBI since 1969 and has been stationed in San Antonio since 1971. Mr. VanDeLoo has been assigned to organized crime and bank robbery.[Vol. V, p. 96]

The Bandito Motorcycle Club has been targeted by the Attorney General of the United States as an outlaw motorcycle gang and thus is to receive top priority for investigation with equal billing with La Costa Nostra. [Vol. V, p. 102] Mr. VanDeLoo is an authority on motorcycle gangs, having attended at least seven seminars concerning outlaw motorcycle gangs having lectured at five of the seven seminars. [Vol. VII, p. 82] The designation of the Banditos Motorcycle Club is not by any State or Federal statute making association with that club unlawful but by a belief within the FBI. [Vol. VII, p. 83]

The Bandito Motorcycle Club first became a priority for accelerated scrutiny by the FBI of San Antonio after the November 1978 assassination attempt of Assistant United States Attorney, James Kerr, of the Western District of Texas. [Vol. V, p. 115; Vol. VII, p. 87] Mr. VanDeLoo believes that the Bandito Motorcycle Club was involved in the assassination attempt upon Assistant United States Attorney Kerr. [Vol. V, p. 115] In May of 1979 United States District Judge John H. Wood was murdered in San Antonio, Texas. Subsequent to the murder, Agent VanDeLoo investigated possible connections with the Bandito Motorcycle Club. [Vol. V, pp. 115-116]

No member of the Bandito Motorcycle Club was charged, indicted, tried or convicted for an assault upon Assistant United States Attorney Kerr. The same is true for the murder of United States District Judge John H. Wood. [Vol. V, p. 117]

Agent VanDeLoo stated the premises for his selection for individuals within the Bandito Motorcycle Club based solely upon

their association with that Club. [Vol. V, pp. 123-124] Members of the Bandito Motorcycle Club were being prosecuted because the FBI considered the Bandito Motorcycle Club not to be a Club but an outlaw motorcycle gang. [Vol. V, p. 109] The Bandito Motorcycle Club is a lawful organiz- [illegible] membership is not a violation of State or Fe[illegible] p. 83] Agent VanDeLoo, based upon inf[illegible] has rec[illegible] ed in volumes and volumes of materials, [illegible]es that Bandito Motorcycle Club is involved in organized crime. [Vol. V, p. 102-103] Agent VanDeLoo believes that individuals who adversely impact the community should be targeted. [Vol. V, p. 101] The Banditos have been prosecuted in Federal and State Court for various and sundry crimes. [Vol. V, p. 103-104] Agent VanDeLoo believes the Bandito Motorcycle Club was involved in organized crime. [Vol. V, p. 134] No definition was ever given as to what Agent VanDeLoo believed organized crime to be.

In August of 1981, DPS Officer Byron Smith began an investigation of massage parlors in Bexar County, Texas. [Vol. V, p. 26] The investigation centered around 33 massage parlors. [Vol. V, pp. 19-20] The State investigation was interested both in the Bandito Motorcycle Club involvement and "Korean Connection." [Vol. V, p. 26] The DPS was interested in everyone who may be violating the State of Texas prostitution laws. [Vol. V, p. 29]

Twenty-three individuals were indicted by the Bexar County Grand Jury for acts of promotion in felony cases. [Vol. V, p. 11] The Bexar County District Attorney's Office had a 90-92% conviction rate on the charges filed against individuals in the investigation participated in by the Department of Public Safety, Bexar County Sheriff's Office, San Antonio Police Department and the FBI. [Vol. V, p. 12] Officer Byron Smith was of the belief that the investigations by State and local authorities were intertwined with the FBI's investigation. [Vol. V, pp. 19-20] Officer Smith agreed with the District Court's finding that the State and Federal matters are "not just related, they are almost identical." [Vol. V, pp. 62-63, Memorandum, Opinion an[illegible] Order entered February 13, 1985 p. 8]

The basis of jurisdiction for Federal prosecution under th[illegible]

Travel Act was the use of charge cards and the United States Mail. Of the 23 people charged in Bexar County Courts for violations of acts of prostitution, 21 advertised the use of charge cards. [Vol. V, p. 11] All of the massage parlors being investigated by Officer Smith were believed to be engaged in prostitution. [Vol. V, p. 53] The DPS was targeting massage parlors and not individuals. [Vol. V, p. 54] Officer Smith acknowledged that all the massage parlors being investigated used charge cards.

Although sufficient information was readily available for the prosecution of any number of individuals similarly situated for violating State prostitution laws, the FBI centered solely on the Bandito Motorcycle Club. [Vol. V, p. 78] Ads could be found in the yellow pages advertising massage parlors with charge cards. [Vol. V, p. 7] Many of the individuals charged in State Court had previous criminal records including prosecutions for prostitution. [Vol. V, pp. 63-64] In the State Court's prosecution, no one was singled out for prosecution once the investigation began and anyone found violating the law would be prosecuted. [Vol. V, pp 85 and 87]

Agent VanDeLoo could not be so broad in his prosecutorial focus due to man power and priority. [Vol. V, p. 100]

Interstate Commerce

Through the testimony of three employees of Atlantis, Diane E. Dillard, Ann Delgado and Brenda Felder, together with the testimony of five customers of Atlantis, Andrew Schwab, Joe Machado, Jr., John Harber, Zafarin Moczygemba, Jr. and Neal Takamoto, the Government offered it's proof of promotion of prostitution. The Government did not ask any of the employee witnesses or the customer witnesses where they were from. Therefore, all the acts took place at the Atlantis Spa in Bexar County, Texas.

Candy Hamin, employee of First City Central Park Bank, San Antonio, Texas, testified as to the account held by Atlantis at her Bank. [Vol. I, pp. 288-290] Ms. Hamm included within her testimony the fact that Atlantis had a Mastercard and VISA merchant credit card contract. [Vol. I, pp. 289-290]

Dan Remmers, Security Manager, MBank-Alamo, San Antonio, Texas, testified as to his knowledge of processing of Mastercard and VISA accounts. Mr. Remmers has worked at MBank-Alamo since July, 1980. [Vol. II, p. 7] Prior to working for MBank-Alamo, Mr. Remmers worked for Southwest States Bank Card Association from 1978 to 1980 as an investigator of credit card fraud. [Vol. II, p. 8] It was from this association that Mr. Remmers based his testimony. Mr. Remmers stated that the merchant deposits his credit card slips with his own bank and receives immediate credit for the deposit. [Vol. I, p. 22] If the business is local, the business makes the deposit and the transaction would be local. [Vol. II, p. 26] Mr. Remmers went on to explain that the depository bank would then gather all the credit card slips and send them to Southwest States Card Association in Dallas, Texas and then would receive immediate credit for their deposits. [Vol. II, p. 9] Banks were credited and debited by means of electronic fund transfer. Mastercard slips were sent to St. Louis, Missouri, and VISA slips to San Mateo, California. [Vol. II, p. 11] In these two respective cities, the information was sorted and the charge slips or the information from the charge slips sent to the issuing Bank. The issuing Bank would then take the information, prepare a billing and send it to the customer. [Vol. II, p. 12] If a Bank was not a member of Southwest States Bank Card Association, the transactions were handled from Dallas, Texas and charge slips were sent to the issuing Bank. [Vol. II, p. 13]

Customer Schwab had his VISA issued from City Bank of New York. [Vol. II, p. 14] Customer Schwab also had a VISA credit card issued from Corpus Christi National Bank, Corpus Christi, Texas. [Vol. II, pp. 14-15] Customer Moczygemba had a VISA card issued from MBank-Alamo, San Antonio, Texas. [Vol. II, p. 18]

Introduction of Extraneous Offences

The Government's theory of prosecution of the Petitioner, **ROBERT STEPHENS**, on Counts Nine through Fifteen of the Indictment was that he was guilty by association in a conspiracy. The Government conceded that he had no actual partic-

ipation in the operation of CC's Spa but t vas responsible for the conduct alleged in Counts Nine through Fifteen by participation in a conspiracy with Harry Clifford Geyer, III, Georgia Carol Donalson and Sharon Padia. The Government relied upon *United States v. Pinkerton,* 328 U.S. 640 (1946) and so stated to the jury in their opening statement. [Vol. I, p. 32] These Counts were ultimately dismissed on Motion of the Government after opening statement, after the Government's presentation of evidence. [Record of proceedings, docket entry 11-21-85.]

Prior to the trial beginning, defense counsel objected to the proposed use of a State Court proceeding wherein the Petitioner had a misdemeanor case dismissed after serving probation. [Vol. I, p. 10] It was the Government's intent to use the extraneous offenses and this is evidenced by the Government's preparation of a Trial Memorandum filed before opening statements were made. [Vol. I, p. 14, Record of Proceeding, Nov. 18, 1985, document 89]

Just prior to the Government resting it's case, additional objections were heard on the admissibility of this dismissed misdemeanor offense. [Vol. II, pp. 61-64] The Court overruled Defendant's objections [Vol. II, p. 65] and the Government called Wayne Campbell, who was an Assistant District Attorney for Bexar County, Texas, and handled the State prosecution of **ROBERT STEPHENS**. The Government proceeded to introduce Exhibit 61 which was a Information charging **ROBERT STEPHENS** with the offense of promotion of prostitution. [Vol. II, p. 67] This was an extraneous offense not charged within the Indictment for which **ROBERT STEPHENS** was being tried.

Disparity of Sentencing

Co-Defendants Harry Clifford Geyer, Georgia Carol Donalson and Sharon Padia all entered pleas of guilty to one Count of the Indictment for which **ROBERT STEPHENS** was tried.

Ms. Donalson received a sentence of five years probated for five years and a fine of $2,000.00 and five hundred hours of

community service. [Vol. V, p. 144] Harry Geyer received a sentence of five years probated for five years with a fine of $5,000.00 and six hundred hours of community service. [Vol. V, pp. 155-156] On that same date, Mr. Geyer was also sentenced in another case to which he had entered a plea of guilty, Cause No. SA-84-CR-180, for which he received a sentence of five years probated to run concurrent with the sentence in SA-84-CR-96. [Vol. V, p. 156]

Defendant, Sharon Padia, on her plea of guilty received a sentence of five years probated for five years and a fine of $2,000.00 and five hundred hours of community service. Each of the above Defendants were sentenced between January 22, 1986 [Vol. V, p. 140] and January 28, 1986. [Vol. V, p. 156]

On November 25, 1985, after the jury returned it's verdict of guilty on all Counts submitted to the jury, **ROBERT STEPHENS** was immediately remanded into the custody of the Marshal. [Vol. III, p. 181]

The sentencing of **ROBERT STEPHENS** did not take place until April 15, 1986 at 2:00 P.M. [Vol. III, p. 181] The Court sentenced **ROBERT STEPHENS** on Counts One and Two to four years imprisonment to run concurrently and sentenced **ROBERT STEPHENS** on Counts Three and Four to a term of confinement of four years to run consecutively with the sentences in Counts One and Two. On Counts Five, Six, Seven, Eight, Sixteen, Seventeen, Twenty and Twenty-One the Court sentenced **ROBERT STEPHENS** to five years imprisonment to run concurrently with each other but consecutively to the sentence imposed in Counts Three and Four. The Court suspended imposition of sentence and granted probation on Counts Five, Six, Seven, Eight, Sixteen, Seventeen, Twenty and Twenty-One only. The Court levied a fine of $5,000.00 as a condition of probation. The Court stated it's intent that he receive a sentence of eight years imprisonment followed by five years probation and a $5,000.00 fine [Vol. III, p. 195]

ISSUE NUMBER I

THE TRIAL COURT'S DISQUALIFICATION OF APPELLANT'S LAWYERS DENIED HIM HIS RIGHT TO COUNSEL OF HIS CHOICE AS HE IS ENTITLED PURSUANT TO THE SIXTH AMENDMENT TO THE CONSTITUTION.

A. GOVERNMENT'S MOTION FOR DISQUALIFICATION WAS UNTIMELY FILED.

The Government's Motion to Disqualified retained counsel of Petitioner was not timely filed pursuant to Rule 12 of the Federal Rules of Criminal Procedure and Local Rule 300-5, Western District of Texas. The United States Attorney's Office had been aware that **TERRENCE W. McDONALD** and **RONALD P. GUYER** were representing Petitioner as early as May 10, 1984. The basis of the Government's assertion of disqualification was that in January of 1983 Byron Smith, Department of Public Safety, had met with **TERRANCE W. McDONALD** in relation to matters concerning prosecution of prostitution cases in Bexar County. The Government's delay in filing its Motion constituting more than nine months certainly precluded it's due consideration as timely filed pursuant to the Federal Rules of Criminal Procedure as well as local rules promulgated within the District.

B. STANDING TO OBJECT

The basis for the Government's Motion for Disqualification concern attorney **McDONALD'S previous employment as an Assistant District Attorney for Bexar County, Texas. The Government maintained an attorney-client relationship between DPS officer and an Assistant District Attorney for Bexar County. The Government, by and through United States Attorney's Office, asserted an attorney-client privilege between a State agency and a State prosecutor, the existence of which was questioned. However, the initial question is standing to object. The State of Texas represents, by virtue of the Texas Constitution, Article 4, Section 2, and Article 4394, et. seq. V.A.T.S. There is no attorney-client relationship between the Bexar County District Attorney's Office and the Department of Public Safety.**

Neither the State of Texas nor the Bexar County District Attorney's Office entered an appearance asserting attorney-client privilege and complaining of a violation *vel non* of an attorney-client relationship. The Attorney General's Office of the State of Texas made no appearance.

C. **NO ATTORNEY-CLIENT PRIVILEGE.**

The Petitioner would respectfully urge to this Court that there was no attorney-client privilege created based on the fact that there were no attorney-client relationships. In order for an attorney-client relationship to be established between an individual and/or an agency with the District Attorney's Office or private attorney, there must be some relationship that would fall into the category of representation. The relationship between Byron Smith and Mr. McDonald was not that of an attorney-client in that no legal services were rendered or information relayed or representation requested or undertaken.

D. **THE ATTORNEY-CLIENT PRIVILEGE, IF ANY, HAS BEEN WAIVED BY THE STATE OF TEXAS.**

The attorney-client privilege, if any, has been waived by the Department of Public Safety and the United States Government. The United States Attorney's Office has engaged in extensive discussions, negotiations and discovery with counsel for Appellants. At no time during any appearance, including the Bond Reduction Hearing or in discussions between counsel and the United States has any question of disqualification of Petitioner's counsel ever been raised. Therefore, if any attorney-client relationship existed between the DPS and Mr. McDonald, it has been waived based upon the conduct and actions of the United States Attorney's Office and DPS Officer Smith.

E. **APPELLANT'S SIXTH AMENDMENT RIGHT TO FREE CHOICE OF COUNSEL OVERRIDES THE GOVERNMENT CLAIMS OF CONFLICT OF INTEREST.**

The Petitioner in this cause has a right under the Sixth Amendment to the United States Constitution to be represented by competent counsel. Although this is not an absolute right, the disqualification of retained counsel of the Petitioner's choice and the exercise of his Sixth Amendment right must be

balanced with the grounds set forth for disqualification. The Petitioner contends that his Sixth Amendment rights exceed any basis for disqualification proffered by the Government.

F. GOVERNMENT'S HIDDEN AGENDA FOR DISQUALIFICATION OF COUNSEL.

This Court has recognized that Government counsel have used a Motion for Disqualification of Counsel for strategic purposes. *Woods v. Covington City Bank,* 537 F.2d 804 (5th Cir. 1976). The record reflects that the Government's Motion for Disqualification was filed January 17, 1985 and the record also reflects that on January 16, 1985 the United States Attorney's Office filed an almost identical Motion for Disqualification in *United States of America v. Peter William VanFlagg,* No. SA-84-CR-173(1) in which case Terrance McDonald and Ronald Guyer represented the Defendant, Peter VanFlagg. McDonald and Guyer had represented Mr. VanFlagg for a period of approximately six weeks and in that case the Government took the position that there was a conflict of interest on similar grounds based upon conversations between the Department of Public Safety Agents and Terrance McDonald, while he was employed with the Bexar County District Attorney's Office.

This Court has recognized that "the rule of disqualification is not mechanically applied..." *Duncan v. Merrill Lynch,* 646 F.2d 1020, 1029 (5th Cir. 1981) citing *Church of Scientology v. McLean,* 615 F.2d 691, 693 (5th Cir. 1980) and so it should not be mechanically applied in this particular case.

> In a disqualification case, the focus of the District Court's inquiry should be on the precise nature of the relationship between the present and former representations (the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent). *Duncan v. Merrill Lynch,* supra at p. 1029.

In its Motion for Disqualification and in the Court's Order, *United States v. Kitchin,* 592 F.2d 900 (5th Cir, 1979) is said to be analogous of the situation to the instant case. There are sim-

ilarities but *Kitchin* is not dispositive of the instant case. *Kitchen* involved the charges of bribery and obstruction of justice of the United States Attorney's Office. The former prosecutor had assigned the case to another assistant but *agreed* with their decision to refrain from prosecution because of possible conflicts.

> Therefore, *Ludwig* was significantly involved in the development of this criminal action prior to indictment and was privy to relevant information then possessed by the Government. *Kitchin,* p. 905.

The former prosecutor in *Kitchin* was closely involved in the primary prosecution. In the instant case, Mr. McDonald was not even involved in Petitioner's case to any degree. The prosecution of **ROBERT STEPHENS** had been concluded prior to Mr. McDonald assuming the position as a prosecutor. He made no decisions pertinent to the instant indictment or the investigation resulting in the indictment. There was no evidence presented by the Government that Mr. McDonald made any decision as to whom should be prosecuted or for what offense, and the decision to pursue the federal prosecution was made prior to Mr. McDonald assuming his position. Mr. McDonald's participation was merely incidental and without consequences to the State or Federal Government.

> A Court should be conscious of its responsibility to preserve a reasonable balance between the need to insure ethical conduct on the part of lawyers appearing before it and other social interest which include the litigants right to freely chosen counsel. *Woods v. Covington County Bank,* 537 F.2d 884, 810 (5th Cir, 1976).

An inflexible application of the Canon's of Ethics could frequently defeat important social interest. This Court is mindful of the application of the Canon's and recognize this when quoting Judge Gurfein from the 2nd Circuit:

> It behooves this Court...while mindful of the existing code, to examine afresh the problems sought to be met by that code, to weigh for itself what those problems are, how real in the practical world that are in fact, and whether a mechanical and didactic application of the code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits. *International Electronics Corporation v. Flanzer,* 527 F.2d 1288, 1923 (2nd Cir. 1975) quoting brief for the Connecticut Bar Association as amicus curiae; see *J.P. Foley and Company v. Vanderbilt,* 523 F.2d 1357, 1359-60 (2nd Cir. 1975), Gurfein J., concurring.

The Canon's of Ethics do not require the disqualification of every attorney who has previously served as an attorney for the Government who subsequently is employed privately although his participation was substantial. *Woods,* supra at p. 812.

It is important to note that basis for Trial Court's disqualification of counsel was based upon the purported communication of the identity of a confidential informant. **TERRANCE W. McDONALD** denied any such knowledge, but more important is the fact that no such issue ever arose during the trial.

Petitioner was denied counsel of his choice for no reason other than the trial strategy of the Government.

ISSUE NUMBER II

THE CIRCUIT COURT FAILED TO ADDRESS THE ISSUE OF THE WRONGFUL DISQUALIFICATION OF PETITIONER'S ATTORNEY OF HIS CHOICE, VINCENT D. CALLAHAN.

The Circuit Court found in it's Opinion of May 19, 1987, that the disqualification of attorney Terrance W. McDonald did not violate Petitioner's Sixth Amendment right to counsel of his choice. Petitioner did not assert that with a proper finding of disqualification of attorney McDonald's law partner, Ronald P. Guyer, was improper and, in fact, acknowledges that with a proper finding of disqualification of McDonald, Ronald P. Guyer would also be disqualified as trial counsel. If a lawyer must withdraw under a disciplinary rule, no partner or associate may accept or continue such appointment. DR5-105(D). *See, United States v. Kitchin,* 592 F.2d 900, 903 (5th Cir. 1979)

However, the disqualification of attorney Vincent D. Callahan subsequent to the Trial Court's disqualification of McDonald and Guyer on February 13th was complained of and made an issue on appeal to the Circuit Court. The Circuit Court failed to address this aspect of the issue complained of.

On April 5, 1985 the Trial Court entered it's Order disqualifying attorney Vincent D. Callahan from representing Petitioner, **ROBERT M. STEPHENS.** The basis of the Court's Order was Mr. Callaghan's friendship and common tenancy with attorneys Terrance W. McDonald and Ronald P. Guyer. Petitioner, **ROBERT M. STEPHENS**, was denied his Sixth Amendment right to freedom of choice of counsel for a second time. Upon the recommendation of previous counsel, **ROBERT M. STEPHENS** engaged Vincent D. Callahan and chose him as the attorney to handle his defense. The Government challenged Vincent D. Callaghan and filed a Motion for Disqualification for which the Court found sufficient association that "public suspicion would be inevitable under the circumstances, as would the appearance of impropriety." The Court cites as it's authority, disciplinary rule 5-105(D) and *United States v. Kitchen,* supra. Subsequent to this recitation, the Court immediately

states that "Callahan is a sole practitioner who has been with McDonald and Guyer since September 1984." Time reference should be made that September of 1984 until the filing of the Order is eight months. And the term "with" indicates that attorney Vincent D. Callahan was a tenant in a building owned by McDonald and Guyer with other sole practitioners when he was employed by Petitioner, **ROBERT M. STEPHENS.**

Attorney Vincent D. Callahan is, under no interpretation of the term, *an associate,* of McDonald or Guyer. The facts outlined by the Trial Court were that Vincent D. Callahan was a friend, co-tenant and colleague of attorneys McDonald and Guyer. This in no way disqualifies him from acting as independent counsel for Petitioner, **ROBERT M. STEPHENS.** This in no way raises the specter of the appearance of impropriety in the public eye. In fact, to speculate that the public would even concern itself with representation of Petitioner, **ROBERT M. STEPHENS,** in the instant case, goes beyond the requirement of the Trial Court to adhere to and enforce the canons of ethics which give guidance as to whether a possible conflict of interest exist.

Attorney Vincent D. Callahan had absolutely no previous contact or association with Petitioner, **ROBERT M. STEPHENS,** or his prosecution in State Court or the investigation in the Federal Court. Attorney Vincent D. Callahan came into the case with absolutely clean hands and with absolutely no obligation to his landlords for his representation of his client, **ROBERT M. STEPHENS.** The most significant fact of his relationship with his landlord was that there was no sharing of fees in a criminal case. (Court's Order of April 5, 1985)

Attorney Vincent D. Callahan has represented individual defendants in the same prosecution with other practitioners in his building without challenge or conflict of interest. *See, United States v. Quintero-Payan,* SA-85-CR-329 (Western District of Texas). Attorney Vincent D. Callahan represented Co-Defendant Mike Real, one of fifty defendants indicted in a RICO prosecution where twenty-one defendants were tried in a joint trial. Attorney Ronald P. Guyer represented Robert Pruitt in that prosecution. No challenge for conflict of interest due to attorneys from the same building representing co-defendants

was made.

Attorney Vincent D. Callahan represented Bobby Lamp in *United States v. Lamp,* while attorney Mark Stevens, also in the same building, same address, same receptionist, same landlords, represented co-defendant Yuretich. There was no challenge for conflict of interest in any of these cases cited herein. *See, United States v. Lamp, United States v. Yuretich,* Appeal No. 85-2120, United States Court of Appeals for the Fifth Circuit.

Mentioned in the Trial court's Order of April 5, 1985 was attorney George Scharmen, sole practitioner at the same address, 442 Dwyer Avenue, as attorneys McDonald, Guyer, Callahan and Stevens. In *United States v. Charles J. Barchuk and Chris Jurgensen,* SA-85-CR-321 (Western District of Texas). attorneys Guyer and Scharmen represented co-defendants in that case wherein Scharmen's client,Jurgensen, cooperated with the Government against Guyer's client, Barchuk, in order to obtain a plea of guilty from defendant, Barchuk. This case is before the Honorable H.F. Garcia, U.S. District Judge, Western District of Texas, and there was no challenge for partners or associates representing multi-defendants creating a conflict of interest.

The Trial Court's focus on the precise nature of the relationship between present and former representation in the instant case does not involve attorney Vincent D. Callahan in any nature other than his office arrangement with Petitioner's previous counsel. *Duncan v. Merrill Lynch,* 646 F.2d 1020 (5th Cir. 1981) The *Duncan,* supra, Court specifically pointed out the rule of disqualification is not mechanically applied. *Duncan v. Merrill Lynch,* supra, at p. 1029:

> A Court should be conscience of it's responsiblity to preserve a reasonable balance between the need to insure ethical conduct on the part of lawyers appearing before it and other social interests which include the litigants' right to freely chosen counsel. *Woods v. Covington County Bank,* 537 F.2d 804, 810 (5th Cir. 1976)

An inflexible application of the canons of ethics could frequently defeat important social interest. In addition to social interests there are very important individual rights under the Sixth Amendment to the Constitution of the United States, to wit:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

ISSUE NUMBER III

SELECTIVE PROSECUTION

THE TRIAL COURT ERRED IN DENYING APPELLANTS'S MOTION FOR VINDICTIVE AND SELECTIVE PROSECUTION AND THEREFORE WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW.

Because of the association with an unpopular group, the Banditos Motorcycle Club, Petitioner, **ROBERT M. STEPHENS,** and his co-Defendants were singled out for Federal prosecution for promotion of prostitution, based solely on their exercise of First Amendment protected rights of association and expression. Other, similarly situated parties, engaged in identical conduct have not been proceeded against. Such invidious discrimination violates Defendant's Fifth Amendment rights to equal protection under the laws and due process.

A. APPELLANT'S PROSECUTION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT AS ANNUNCIATED IN BARRIOS.

A century has passed since the Supreme Court concluded that the administration of laws "with an evil eye and unequal hand" between persons similarly situated constitutes a denial of equal protection. *Yickwo v. Hopkins,* 118 U.S. 356, 373-74 (1886). This fundamental priniciple is applicable to the Federal Government through the Equal Protection component of the Fifth Amendment Due Process Clause. *Bolling v. Sharpe,* 347 U.S.

947 (1954). The test for deciding when a decision to prosecute unconstitutionally denies equal protection of the laws was established in *United States v. Barrios,* 501 F.2d 1207, 1211 (2nd Cir. 1974) and is the law in the Circuit. *United States v. Johnson,* 577 F.2d 1304 (5th Cir. 1978); *United States v. Kahl,* 583 F.2d 1351 (5th Cir. 1978). The test for determining whether selective prosecution violates equal protection requires that:

1. "Others similarly situated have not been proceeded against; and

2. The Government discriminatory selection is invidious or in bad faith, e.g. based on such impermissible considerations as race, religion, or the desire to prevent exercise of constitutional rights." *United States v. Barrios,* supra at p. 1211.

B. ONLY DEFENDANTS WHO WERE ASSOCIATED WITH THE BANDITOS MOTORCYCLE CLUB HAVE BEEN PROCEEDED AGAINST WHILE OTHERS SIMILARLY SITUATED HAVE NOT BEEN PROSECUTED.

The Indictment charged the Petitioner, ROBERT M. STEPHENS, with promoting prostitution by use of interstate commerce, to wit: VISA bank card system and the United States Mail.

Within Bexar and Travis Counties and the surrounding areas, there are numerous "massage parlors" and "spas" who accept credit cards; yet, only businesses with ties to the Banditos Motorcycle Club were prosecuted. This is clearly impermissible selective prosecution. Claims of selective prosecution have been upheld where the Defendant has shown that the Government was aware of other violations of the law, but only the Defendants who were members of an unpopular group were prosecuted. *United States v. Falk,* 479 F.2d 616 (7th Cir. 1973).

C. THE GOVERNMENT SELECTIVE PROSECUTION OF THE APPELLANT IS BASED ON CONSTITUTIONALLY IMPERMISSIBLE CRITERIA.

The Federal Government has an irrational hatred for motorcycle clubs such as the one with which Petitioner, **ROBERT M.**

STEPHENS, was associated. Petitioner, **ROBERT M. STEPHENS,** was indicted because of his association and that associations collective exercise of its right to expression is offensive to the federal law enforcement community, rather than for the offenses charged.

The federal law enforcement community and, in particular, the agents involved in the Petitioner's investigation have accused the Banitos Motorcyle Club of responsibility for the attempted assassination of Assistant United States Attorney James Kerr. This totally unfounded accusation resulted in numerous instances of federal harassment of club members. The instant prosecution constitutes just such discriminatory treatment of similarly situated citizens based solely on their exercise of constitutionally protected rights of association and expression.

D. UNDER THE GUIDELINES ENUMERATED IN *ROBERTS V. JAYCEES* THE BANITOS MOTORCYCLE CLUB IS AN ASSOCIATION.

As set out in *Roberts v. United States Jaycees,* 82 L.Ed.2d 462 (1984), the distinguishing aspects of an organization are: relative smallness, high degree of selectivity and decisions to begin and maintain the affiliation, and seclusion from others in critical aspect of the relationship. *Roberts,* Id. The Banditos Motorcylce Club meets these and other requirements of a constitutionally protected association.

A. The Banditos are a relatively small organization.

The San Antonio Chapter of the Banditos has a membership of approximately 15. Further, according to a brochure distributed by the Federal Law Enforcement Training Center (FLETC), "normally [such motorcycle group] have limited membership."

B. There is a high degree of selectivity and decision to begin and maintain the affiliation.

"According to the By-Laws of the San Antonio Banitos Motorcycle Club and FLETC brochure, all prospective members must be sponsored by an old member; each new club

> hopeful must complete a one year probationary status, and all members of the club must vote in favor of admittance. For any of the following offenses, a club member will lose his membership, e.g.: (1) any member caught using the needle [hard drugs] will lose his "colors and all that goes with them." (2) Stealing from another club member. (3) Hitting another club member.

C. There is seclusion from others in critical aspects of the relationship.

> The public is not invited to any meetings, and due to the lifestyle and appearance of most club members, it is not likely they would want to be.

In short, the Banditos are a small selective club that neither desires or tolerates strangers. See: *Roberts v. Jaycees,* 82 L.Ed.2d 462.

E. THE RIGHT OF ASSOCIATION IS NOT LIMITED TO POPULAR OR NON-CONTROVERSIAL GROUPS.

The right of association is more than the right to attend a meeting; it includes the right to express ones attitude or philosophies by membership in a group or by affiliation with it. *Griswold v. Connecticut,* 381 U.S. 479 (1965). Motorcylce clubs such as the Banditos call themselves the "1%ers". They feel they are the one percent who doesn't fit in any society and doesn't care. Quoting one Alcohol, Tobacco and Firearms publication: "fuck the world is their motto and they are proud of their unorthodox appearance and lifestyle." While law enforcement authorities may not approve of such expression, and many citizens may not approve of this attitude of lifestyle the Government cannot, consistent with the guarantee of freedom of expression, attempt to exercise as offensive one particular group, thought or statement under the general assertion that the

Government is acting as the guardian of public morality. Cf. *Cullen v. California,* 403 U.S. 15 (1971). While some lifestyles are more distasteful than others "one mans vulgarity is another mans lyric." *Cullen v. California,* supra at p. 25. Mere unorthodoxy or dissent from prevailing thought is not to be condemned, but freedom to associate applies to the beliefs we share and to those we consider reprehensible. *Healy v. James,* 408 U.S. 169 (1972), *NAACP v. Claiborne Hardware Company,* 418 U.S. 886 (1958), *NAACP v. Alabama,* 357 U.S. 449 (1958).

For example, in *Cullen,* the Defendant had entered the Los Angeles County Courthouse "wearing a jacket bearing the words 'fuck the draft' which were plainly visible." *Cullen v. California,* supra at p. 17. The Supreme Court, Justice Harland speaking for the majority, noted that "while the particular four letter word being litigated here is perhaps more distasteful than most others of its genre it is nevertheless often true that one man's vulgarity is another man's lyric." *Cullen v. California,* supra at p. 25.

> Additionally, we cannot overlook the fact...that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpresible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Cullen v. California,* supra at pp. 25-6.

In *Gilmore v. City of Montgomery,* 417 U.S. 556 (1974), the Supreme Court held that:

> The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. 477 U.S. 474 (1984)

Again, the *NAACP v. Claiborne Hardware Company,* supra, the Supreme Court reiterated that it has "consistently disapproved of governmental action imposing criminal sanctions...solely because of a citizens association with an unpopular organization." 458 U.S. at page 919; *Healy v. Jones,* supra, at p. 185.

F. THE SUPREME COURT HAS CONSISTENTLY DISAPPROVED GOVERNMENTAL ACTION IMPOSING CRIMINAL SANCTIONS BECAUSE OF A CITIZENS ASSOCIATION WITH NON-POPULAR ORGANIZATIONS.

Criminal liability may not be imposed upon an individual merely because he belongs to a group. "Even if the group has both legal and illegal aims." *NAACP v. Claiborne,* supra at p. 919. In the instant case, there is no hard evidence that the Banditos *as a group* have any illegal aims whatsoever. The Government tried the Petitioner for his association with a group whose cultural beliefs and lifestyle it found repugnant. The Constitution simply will not tolerate such mentality. *Griswold v. Connecticut,* supra; *Healy v. James,* supra; *NAACP v. Alabama,* supra; *NAACP v. Claiborn Hardware Company,* supra. The Supreme court observed in *Gilmore v. City of Montgomery,* supra at p. 574:

> [T]he Government may not tell a man or a woman who his or her associates must be. The individual can be selective as he desires.

Just as discrimination on the basis of race or religion is prohibited so is discrimination on the basis of the exercise of protected First Amendment activity such as expressive association. *United States v. Falk,* supra:

> Just as discrimination on the basis of religion or race is forbidden by the Constitution so is discrimination on the basis of exercise of protective first amendment

activities whether done as an individual or as in this case, as a member of a group unpopular with the Government."

G. THE JUDICIARY HAS THE BASIC RESPONSIBLITY TO PROTECT INDIVIDUALS AGAINST DISCRIMINATION FROM ALL BRANCHES OF THE GOVERNMENT.

The decisions of the Supreme Court recognize that abridgement of the consitutional right of association, even if unintended, will inevitably follow from varied forms of governmental activity. *NAACP v. Alabama,* supra at p. 12. Invidious discrimination takes an even heavier toll on the freedom to associate. *Norwood v. Harrison,* 413 U.S. 455 (1973). While the Petitioner recognizes that the decision to prosecute is generally within the discretion of the prosecutor "the judiciary has always born the basic responsiblity for protecting individuals against unconstitutional invasions of their rights by all branches of the government." *United States v. Falks,* supra at p. 624. Quoting *Stamler v. Willis,* 415 F.2d 1365, 1369-70 (7th Cir. 1969) cert. den'd *Ichord v. Stamler,* 399 U.S. 929 (1970).

CONCLUSION

The Government may not impose criminal sanctions solely "because of a citizens association with an unpopular organization." *NAACP v. Claiborn Hardware Company,* supra at p. 575. The Government's action in this prosecution has done just that. It is in fact reprehensible and this Court should make amends by reversing conviction had upon such prosecution.

ISSUE NUMBER IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL FOR THE REASON THAT THE GOVERNMENT FAILED TO PROVE THE USE OF INTERSTATE COMMERCE.

The basic purpose of the Travel Act, 18 United States Code, Section 1952, was to combat organized crime and racketeering by denying the facilities of interstate commerce to the individuals engaged in these nefarious activities. By making it unlawful to travel interstate to promote the illegal enterprises mentioned in Section 1952 or to distribute the proceeds therefrom among "syndicate" members, it was intended to strike a blow at the inter-related network of criminals whose influence and activities extended over State and national borders. The statute was designed to assist local law enforcement officials whose work was often inpeded by the interstate nature of syndicate controlled criminal activity. [See Report of the Committee on the Judiciary of the United States House of Representatives (HR No. 966, 1961, U.S. Code Congressional Administrative News 2664).]

The statute makes interstate travel an element of a violation of the travel act. It is up to the Courts to determine the relationship between the interstate travel and the unlawful activity which will bring a defendant within the reach of the Travel Act.

All circuits have recognized that interstate travel which has been determined to be incidental, peripheral, or fortuitous to the carrying on of illegal activity is not within the reach of the Travel Act. *United States v. Botticello,* 422 F.2d 832 (2nd Cir. 1970); *United States v. Wander,* 601 F.2d 1251 (3rd Cir. 1979); *United States v. Hawthorne,* 356 F.2d 740 (4th Cir. 1966) cert. den'd. 384 U.S. 908; *United States v. Gooding,* 473 F.2d 425 (5th Cir. 1973) cert. den'd. 412 U.S. 928; *United States v. O'Dell,* 671 F.2d 191 (6th Cir. 1982); *United States v. Craig,* 573 F.2d 455 (7th Cir. 1977) cert. den'd. 439 U.S. 820.

Both business institutions named within the Indictment and presented in the Government's evidence being CC's and the Atlantis were located in Bexar County, Texas, 150 miles from Mexico, 290 miles from Louisiana, 300 miles from Oklahoma, 450 miles from New Mexico.

The individuals named as Defendants in the Indictment, Harry Geyer, Georgia Carol Donalson, Sharon Padia and Petitioner, **ROBERT M. STEPHENS,** all resided in San Antonio.

The Banks with which Petitioner and Co-Defendants were shown to do business were all located within San Antonio. The employees the Government showed worked at both places of business were from San Antonio. The Government did not introduce any customer of either business who orginated from out of the state of Texas.

The interstate commerce aspect of this case involves the use of VISA bank card system and Mastercard bank system and the use of United States Mail. The Government's proof as to the use of these charge cards and the use of mail were in all things incidental, peripheral and fortuitous to any illegality which the Government proved.

The testimony of Mr. Remmers who had previously worked for Southwest States Bank Card Association from 1978 to 1980 provided the information concerning any interstate activity in the instant case. His information as to the bank card systems is inadequate and insufficient to base a conviction on due to the fact his knowledge was for the system prior to 1980. The acts within the Indictment are 1981 and 1982. Therefore any testimony he had concerning what would have happened with VISA or Mastercard charges prior to these dates could not be sufficient evidence for proof of interstate commerce. Mr. Remmers did not state a present authority or expertise as to the manner in which Mastercard or VISA charges were handled.

Taking what Mr. Remmers did testify about, the interstate aspect of this case is incidental to the offenses for which the Petitioner was tried. It is important for the Court to note that once the charge slips were taken by Petitioner to his local Bank he received instant or immediate credit. [Vol. I, p. 22] Therefore, the Petitioner's use of Mastercard or VISA terminated as far as interstate commerce goes. Tracing the

Mastercard and VISA process from the local Bank in San Antonio to Dallas, Texas and then possibly to California or Missouri only demonstrates the tenuous nature of the interstate aspect of this case. It clearly shows that the VISA and Mastercard used in this case was incidental, peripheral and fortuitous.

In *Rewis v. United States,* 401 U.S. 808, 811 (1971), the Supreme Court recognized that the legislative history of the Travel Act "was aimed primarily at organized crime and, more specifically, at persons who reside in one state while operating or managing illegal activities located in another." The Court reversed a conviction of a relatively minor State offense which had been trasnformed through the Travel Act into a Federal felony. In reversing, the Court stated that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Citing *Bell v. United States,* 349 U.S. 81, 83 (1955). Thus, this Court should analyze the nature of the "interstate nexus". *United States v. Perrin,* 580 F.2d 730 (5th cir. 1978) aff'd. 444 U.S. 37 (1979) Although sufficient nexus was found in the *Perrin* case, the analysis in this case provides a relatively minor State violation which can only be made into a Federal offense by happenstance of modern banking practices.

Petitioner would suggest to the Court that this was not the legislative intent of Congress for the Travel Act. The requisite interstate nexus has not been shown in the instant case.

ISSUE NUMBER V

DISPARITY OF SENTENCING

THE TRIAL COURT PUNISHED APPELLANT FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO TRIAL BY IMPOSING A SENTENCE OF CONFINEMENT IN GROSS DISPARITY TO HIS CO-DEFENDANTS.

As noted by the Trial Court prior to passing sentence upon Petitioner:

> ...[Y]ou exercised your right to a trial by jury and the jury saw it differently than you did. They found you guilty of twelve Counts of this Indictment. That exposes you to a possible sentence of sixty years and $120,000.00 in fines - that is your exposure. [Vol. III, p. 194]

Petitioner certainly recognizes the Trial Court's broad discretion in passing sentence. *United States v. Tobias,* 662 F.2d 381 (5th cir. 1981) However, the Court cannot be unmindful of the position of the four Defendants within the Indictment. Three Defendants, as previously stated, pled guilty. Each of these three Defendants received a probated sentence. Upon their plea of guilty, each Defendant had exposure of five years and fines not to exceed $10,000.00. While each Defendant had an agreement with the Government to dismiss the remaining Counts of the Indictment, the Court certainly had the power to "conduct as inquiry broad in scope, largely unlimited either as to kind of information he may consider, or the source from which it may come." *Roberts v. United States,* 441 U.S. 552, 556 (1980) The Court did not sentence the three Defendants who entered their pleas of guilty until after the trial of Petitioner. The Court had the opportunity then to hear the evidence as to each of the Defendants who were ultimately sentenced.

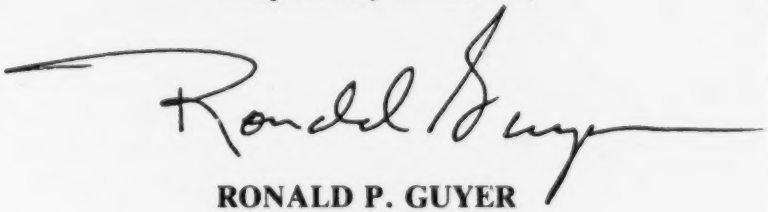
The distinctions between Petitioner and his three Co-Defendants came down to **ROBERT STEPHENS** electing to go to trial and his three Co-Defendants did not. The Court has charged excessive rent on the Courthouse for **ROBERT STEPHENS** exercising his Constitutional right to a trial by jury. It appears that **ROBERT STEPHENS** is punished not for his acts but for his election to go to trial.

The Co-Defendants in the instant case did not cooperate with the Government or provide testimony against **ROBERT STEPHENS** or any other Defendant. The position of the Co-Defendants remained equal. The only difference being **ROBERT STEPHENS'** exercise of Constitutional right to trial by jury. The affect is chilling upon any Defendant wishing to exercise his Constitutional right to trial by jury in the Western District of Texas.

The Government certainly is permitted to encourage guilty pleas by offering benefits to Defendants who are willing to enter into such an agreement with the Government. *United States v. Johnson,* 679 F.2d 54, 58 (1982) The record does not reflect that any plea offer was made to **ROBERT STEPHENS** and rejected by him. Counsel for Petitioner is certainly aware of theCourt's decisions in *United States v. Lauga,* 762 F.2d 1288 (5th Cir. 1985) and *United States v. Castillo-Roman,* 774 F.2d 1280 (5th Cir. 1985). In both of these decisions, the Court has very clearly stated that asentencing Court is not required to annunciate it's reasons for a sentence and a mere disparity amongst Co-Defendant alone does not constitute a reason for remand for re-sentencing. However, there is no basis, no reason, no grounds, no explanation for the harsh treatment given Petitioner **ROBERT STEPHENS** other than exercise of his Constitutional right to trial by jury. Petitioner urges the Court to review the record, review circumstances of sentencing and reconsider its position on disparity of sentencing in the instant case.

WHEREFORE, PREMISES CONSIDERED, Petitioner, **ROBERT M. STEPHENS,** respectfully prays the Court to reverse the convictions complained herein and render, and in the alternative, the Petitioner prays the Court to reverse the convictions complained of herein and remand for new trial.

Respectfully submitted,



RONALD P. GUYER
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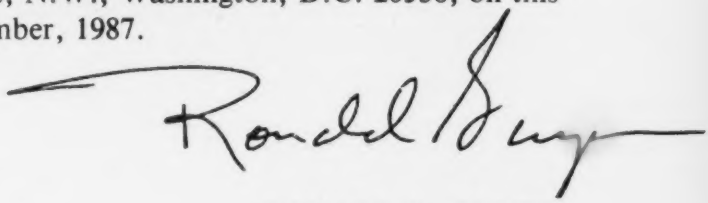
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been delivered to the Assistant United States Attorney, 655 East Durango Blvd., San Antonio, Texas, and Solicitor General, Department of Justice, Tenth Street and Constitution Avenue, N.W., Washington, D.C. 20530, on this the day of September, 1987.



RONALD P. GUYER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2293

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

versus

ROBERT M. STEPHENS
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Western District of Texas
(SA-CR-84-96)

(May 19, 1987)

Before RUBIN, RANDALL, and JOHNSON, Circuit Judges:*

A twenty-one count indictment charged defendant Robert M. Stephens of conspiring to violate (18 U.S.C. § 371) and violating the Travel Act (18 U.S.C. § 1952) by promoting prostitution, in violation of Texas law, in connection with his operation of the Atlantis Spa massage parlor. Nine of the counts were dismissed. The jury then found Stephens guilty of the remaining twelve counts--one

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

count for conspiracy and eleven counts for Travel Acts violations. On appeal, Stephens argues that the district court erred (1) in disqualifying one of Stephens lawyers, (2) in denying his motion to dismiss because of selective prosecution, (3) in determining that the evidence was not sufficient to show the use of an interstate facility as required under the Travel Act, (4) in holding that Stephens' plea of guilty in a related state court prosecution could be admitted into evidence, and (5) in imposing a sentence that is harsher than the sentences of his co-indictees. We reject Smith's challenges and affirm.

Discussion

I.

Upon the Government's motion, the district court disqualified attorney Terrance McDonald from representing Stephens in this action.

Officer Byron Smith of the Texas Department of Public Safety ("Public Safety") had, beginning in the spring of 1981, investigated massage parlors for violations of Texas statutes making criminal the promotion of prostitution. In his investigation, Officer Smith worked with the Criminal District Attorneys' Office for Bexar County, Texas ("Bexar County D.As.' Office"), which succeeded by March 1982 in obtaining indictments against numerous individuals, including Stephens and his co-indictees herein. By November 1982, plea bargains had been reached in most of the cases, including those of Stephens and his co-indictees.

Attorney McDonald assumed his position as Chief Deputy in the Bexar County D.As.' Office in January 1983. McDonald first met with Officer Smith in the month before McDonald began working in his new position. They discussed the state massage parlor investigation, and once in office, McDonald personally handled the remaining state cases. Officer Smith met with McDonald numerous times thereafter and also assisted in the federal

investigation that produced the instant indictment against Stephens.

The district court relied upon Canons 4 and 9 of the Texas Code of Professional Responsibility[1] in disqualifying attorney McDonald.

Canon 4

Concerning Canon 4,[2] the district court invoked case law requiring the party moving for disqualification to prove (1) "the existence of prior attorney-client relationship" and (2) "a genuine threat that confidences revealed to...former counsel will be divulged."[3] **Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.**, 646 F.2d 1020, 1028 (5th Cir. Unit B);[4] *see also* **Doe v. A Corp.**, 709 F.2d 1043,

[1]Rule 200-4 of the Local Court Rules for Western District of Texas provides:

> Every member of the bar of this Court and any attorney permitted to practice in this Court under Local Rule 200-1 hereof shall familiarize himself with and comply with the standards of professional conduct required by members of the State Bar of Texas and contained in the Code of Professional Responsibility, Section 8, Art. XII, Rules Governing the State Bar of Texas, Vol. 1-A, V.A.T.S., and the decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this Court. This specification shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Code of Professional Responsibility of the American Bar Association shall be noted.

[2]Canon 4 of the Texas Code of Professional Responsibility provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

[3]The **Duncan** Court applied the American Bar Association's Code of Professional Responsibility, canon 4 of which is identical to canon 4 of the Texas Code. **Duncan**, 646 F.2d at 1022 & n.2.

[4]*Cert. denied,* 454 U.S. 895 (1981), *overruled on appealability,* Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984).

1046-47 (5th Cir. 1983); **Wilson P. Abraham Construction Corp. v. Armco Steel Corp.**, 559 F.2d 250, 252 (5th Cir. 1977), *overruled on appealability,* **Duncan**, 646 F.2d 1020. With respect to this latter element concerning a genuine threat, the moving party need not "point to specific confidences revealed"; it is enough to show "that the subject matters of the present and prior representations are 'substantially related,'" after which "the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation." 646 F.2d at 1028.

As to the first element in the **Duncan** showing, the district court determined that an attorney-client relationship had come into being when Public Safety conferred with the Bexar County D.As.' Office about prosecuting the eventual defendants, including Stephens, in the state massage parlor cases. Stephens tends to argue that Canon 4 cannot apply because there can be no attorney-client relationship in which a governmental entity--such as Public Safety or the State of Texas--is the client. Stephens misperceives the law. *See* **United States v. Kitchin**, 592 F.2d 900, 904 (5th Cir.), *cert. denied*, 444 U.S. 843 (1979).

As to the second element in the **Duncan** showing, the district court determined that the subject matters of the former representation (prosecution under state law for promotion of prostitution) and the instant representation (prosecution under federal law for the same promotion of prostitution) were substantially related. *See* **In re Corrugated Container Antitrust Litigation**, 659 F.2d 1341, 1346 (5th Cir. Unit A 1981) (when the present and prior representations "concern the very same subject matter, reasonable minds must agree they are substantially

related") *overruled on appealability*, **Gibbs**, 742 F.2d 181.[5]

Thus, the irrebutable **Duncan** presumption arose "that relevant confidential information was disclosed during the former period of representation." **Duncan**, 646 F.2d at 1028. Moreover, the district court found that confidential information, the identity of a confidential informant, had in fact been disclosed to attorney McDonald while he was working on the state prostitution prosecutions in the Bexar County D.As.' Office. Stephens has not demonstrated that the district court's underlying findings of fact were clearly erroneous; nor that its legal reasoning was in error. *See* **United States v. Snyder**, 707 F.2d 139, 144 (5th Cir. 1983). We therefore need not address the district court's thoughtful treatment of Canon 9 as an alternate ground for disqualification. *See* **In re Corrugated Contained Antitrust Litigation**, 659 F.2d at 1344-45.

Timeliness

Stephens argues that the Government's disqualification motion, made in January 1985, was untimely because the Government knew as early as May 1984 that attorney McDonald was representing Stephens. Stephens ignores

[5]Stephens tends to argue that the relevant *former representation* began in January 1983 when attorney McDonald began working in the Bexar County D.As.' Office and observes that the state prosecution against Stephens had been resolved before January 1983. We disagree. The district court found that the many state prosecutions resulting from the state massage parlor investigation were intertwined, sharing the same investigative techniques and witnesses. Under these circumstances, the district court wisely concluded that representation by the Bexar County D.As.' Office was not so many multiple representations, each related to a different prosecution, but rather one representation encompassing all the intertwined state prosecutions. Given the intertwined nature of these prosecutions, an attorney, such as McDonald, who had responsibility for part of the representation must be presumed to have had access to information pertinent to the entirety of the representation.

the district court's explicit finding that the Government first became aware of McDonald's conflict of interest in October 1984 and brought the conflict to the district court's attention in November 1984 before making the formal motion in January 1985. Stephens makes no effort to show the district court's finding to be clearly erroneous. Thus, the delay was as the district court found: as short as one month, no longer than three. We note that other courts have determined delays of similar length in seeking disqualification to be reasonable. *See* **EZ Painter Corp. v. Padco, Inc.**, 746 F.2d 1459, 1463-64 (Fed. Cir. 1984); **Paul E. Iacono Structural Engineer, Inc. v. Humphrey**, 722 F.2d 435, 442-43 (9th Cir.), *cert. denied,* 464 U.S. 851 (1983).

Standing

Stephens also agues that the Government lacked standing to assert McDonald's Canon 4 violation. This Circuit rejected a similar argument in **In re Gopman,** 531 F.2d 262, 265-66 (5th Cir. 1976). *See also* **Brown & Williamson Tobacco Corp. v. Daniel International Corp.**, 563 F.2d 671, 673 (5th Cir. 1977), *overruled on appealability,* **Duncan**, 646 F.2d 1020); **In re Paradyne Corp.**, 803 F.2d 604, 608 n.7 (11th Cir. 1986). This contention is without merit.

II.

Stephens contends that the district court erred in denying his motion to dismiss because of selective prosecution.

In **Wayto v. United States**, 470 U.S. 598, 105 S. Ct. 1524 (1985), the Supreme Court stated that a defendant making a selective prosecution claim must show "discriminatory effect and ...discriminatory purpose." **Wayte**, 105 S. Ct. at 1531 (footnote omitted). In **Wayte**, the Supreme Court reviewed a Ninth Circuit decision that had required the defendant to make a prima facie "showing, which, if rebutted, would directly establish

[6]**Wayte**, 105 S. Ct. at 1529-30.

discriminatory effect and purpose." *Id.* at 1531 n.10. The prima facie showing required by this Circuit: The defendant must show (1) "that he has been singled out for prosecution although others similarly situated who have committed the same acts have not been prosecuted" and (2) "that the government's selective prosecution of him has been constitutionally invidious," that is, "actuated by constitutionally impermissible motives on its part, such as racial or religious discrimination." **United States v. Jennings**, 724 F.2d 436, 445 (5th Cir.), *cert. denied,* 467 U.S. 1227 (1984); *see also* **United States v. Garth**, 773 F.2d 1469, 1476 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 2246 (1986); **United States v. Ramirez**, 765 F.2d 438, 439-40 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 812 (1986).

As to the first element in the **Jennings** showing, the district court apparently accepted Stephens' contention that, of the massage parlor defendants prosecuted by the Bexar County D.As.' Office under state law for promotion of prostitution, only those defendants who were members of the Bandido Motorcycle Club were selected for federal prosecution, even though the remaining state defendants also committed federal offenses. The district court determined, however, that Stephens had not established the second element in the **Jennings** showing. The district court found that Stephens and the other federal defendants were selected, not because of their exercise of rights of association and expression as Stephens contends, but because of their involvement in "*organized* crime activities." Stephens has not shown this finding on impermissible motive to be clearly erroneous.[7] *See* **United States v. Benny**, 786 F.2d 1410, 1418-19 (9th Cir.), *cert. denied,* 107 S. Ct. 668 (1986); **United States v. Wilson**, 639 F.2d 500, 503 & n.2 (9th Cir. 1981).

[7]Consequently, we need not review whether Stephens met his burden on the first element of the **Jennings** showing for selective prosecution.

III.

At the close of the Government's case in chief, Stephens moved for acquittal on the ground that the evidence was insufficient to show the element of "use [of] any facility in interstate or foreign commerce, including the mail," 18 U.S.C. § 1952, as required by the Travel Act. *See generally* **United States v. Briggs**, 700 F.2d 408, 417 (7th Cir.), *cert. denied,* 461 U.S. 947 and 462 U.S. 1110 (1983), *cert. denied,* 455 U.S. 939 (1982); **United States v. Hedge**, 462 F.2d 220, 223 (5th Cir. 1972). Stephens contends that the district court erred in denying the motion. Since Stephens did not renew the motion at the close of all the evidence, the issue of sufficiency of the evidence is now "'reviewable on appeal only to determine whether there was a manifest miscarriage of justice.'" **United States v. Gammage**, 790 F.2d 431, 436 (5th Cir. 1986) (quoting **United States v. Merritt**, 639 F.2d 254, 256 (5th Cir. 1981).

The evidence tended to show that, in twenty-five to thirty percent of the Atlantis Spa massage parlor's business, customers had paid with a credit card. The Government's evidence focused on eleven credit card transactions, seven of which were charged to credit cards requiring processing through interstate clearing centers in Missouri and California. The remaining four credit card charges were cleared within the state of Texas, but through use of the federal mails. Moreover, even in the case of the seven charges cleared interstate, the federal mails were used to send billing statements to the Atlantis Spa customers.

Considered "in the light most favorable to the government," **United States v. Pool**, 660 F.2d 547, 560-61 (5th Cir. Unit B 1981), the seven credit card charges cleared interstate, the four charges cleared through use of the federal mails, and the other use of the mails, taken together against the background of Atlantis Spa's substantial credit card-generated business, show Stephens' sufficiency argument to be without merit under the miscarriage

of justice standard. Stephens' argument that all of the credit card transactions should be disregarded is without merit.

IV.

As noted, Stephens pleaded guilty in the related state prosecution against him for promotion of prostitution. The district court admitted evidence of this guilty plea. Stephens challenges this evidentiary ruling.

The charging instrument in the state prosecution charged Stephens with "promotion of prostitution" "on or about the 30th day of September...1981" in violation of Texas law by "knowingly and unlawfully receiv[ing] money pursuant to an agreement to participate in the proceeds of prostitution." By entering a guilty plea, Stephens "has admitted all the elements of the offense" charged in the state prosecution. **Baxter v. Estelle**, 614 F.2d 1030, 1036 (5th Cir. 1980), *cert. denied,* 449 U.S. 1085 (1981); *see also* **United States v. Robertson**, 582 F.2d 1356, 1368 (5th Cir. 1978).

Count I of the indictment in the instant prosecution charged, among other things, that Stephens, pursuant to an agreement with his co-indictees, "received payments...in exchange for prostitution activities" in violation of Texas law between October 1978 and November 1982. Thus, the unlawful promotion of prostitution to which Stephens admitted through his state guilty plea corresponded with part of the unlawful promotion of prostitution charged in the instant prosecution. Stephens' guilty plea was properly admitted; a "guilty plea is admissible in a subsequent collateral criminal trial as evidence of an admission by a party opponent" under Federal Rule of Evidence 801(d) (2). **United States v. Holmes**, 794 F.2d 345, 349 (8th Cir. 1986); *see also* **Bower v. O'Hara**, 759 F.2d 1117, 1127 (3rd Cir. 1985); **United States v. Meyer**, 733 F.2d 362, 363 (5th Cir. 1984).

Stephens also argues that the guilty plea was inadmissible because the state prosecution resulted in deferred adjudication and dismissal and a Texas statute provides that such a dismissal "may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense." Tex. Crim. Proc. Code Ann. art 42.12 sec. 3d(c) (Vernon Supp. 1987). As explained, Stephens' guilty plea was admitted into evidence as an admission by Stephens of the unlawful promotion of prostitution charged in the state prosecution and wholly apart from the ultimate disposition in that prosecution, whether conviction or otherwise, and certainly apart from any disqualification or disability attaching to convictions.

V.

Finally, Stephens challenges the sentence he received as harsher than the sentences received by his co-indictees. This contention is frivolous. **United States v. Castillo-Roman,** 774 F.2d 1280, 1284 (5th Cir. 1985); **UNited States v. Lauga**, 762 F.2d 1288, 1291-92 (5th Cir.), *cert. denied,* 106 S. Ct. 173 (1985); **United States v. Hayes**, 589 F.2d 811, 827 (5th Cir.), *cert. denied,* 444 U.S. 847 (1979).

Conclusion

We have considered Stephens' remaining contentions and have found them to be without merit. For the foregoing reasons, both the conviction and sentence of the district court are

AFFIRMED.

BEST AVAIL

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff

VS. SA-84-CR-96-2

ROBERT MORRIS STEPHENS,

Defendant

MEMORANDUM OPINION AND ORDER

On the 1st day of February, 1985, came on to be heard the government's motion to disqualify Terrence McDonald and Ronald P. Guyer as attorneys for defendant Robert Morris Stephens. The motion is based on McDonald's former position as Chief Deputy in the Bexar County Criminal District Attorney's Office and his participation in the state prosecution of persons whose criminal cases arose from the same investigation which resulted in the indictment in federal court of defendants Stephens, Geyer, Donaldson and Padia (the federal defendants). McDonald, now in private practice, and Guyer, his law partner, seek to defend Stephens on the charges in the indictment. The Court, having read the government's motion and defendant's response, and having considered the evidence, is of the opinion that the motion should be granted. In a recent opinion in *United States of America v. Peter William Vanflagg,* cause number SA-84-CR-173(1), Chief Judge of the Western District William S. Sessions disqualified McDonald and Guyer based upon the former's participation, as a prosecutor, in the investigation of Vanflagg. While that case involved different facts than the case at bar, the opinion contains a relevant discussion of the applicalbe legal priniciples and, as referred to

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hereinafter, is concurred in and adopted by this Court.

BACKGROUND

Beginning in the spring of 1981, Byron Smith, an officer of the Texas Department of Public Safety (D.P.S.), investigated massage parlors on state charges of promotion of prostitution. He dealt with District Attorney Bill White of the Bexar County Criminal District Attorneys' Office (D.A.), and two assistant district attorneys in obtaining indictments against approximately 33 persons including the federal defendants in March, 1982. The present district attorney Sam Millsap defeated Bill White in the May, 1982 Democratic Primary and took office January 1, 1983. In October and November, 1982, plea bargains were reached in most of the cases including those of the federal defendants. At that time, a similar investigation was being pursued by the Federal Bureau of Investigation.

McDonald began in the D.A.'s office in January, 1983 as Chief Deputy. Smith first met with him in December, 1982 knowing what position McDonald was about to assume. Smith and McDonald discussed the massage parlor investigation and the status of the cases. They met on two or three occasions in December, once with Nick Rothe, another newly appointed member of the D.A.'s office, to discuss the cases which would be pending when Millsap took office as well as other aspects of the investigation. After McDonald and Rothe took office, conversations continued regarding the cases. The state cases against the federal defendants had been disposed of by the D.A. prior to January, 1983. McDonald decided to personally handle the remaining massage parlor cases. Investigative records were seen by him, and any other information he needed was made available to him, including the names of the confidential informant and the witnesses. McDonald was one of only three persons who had access to the names of all informants involved in cases pending in the D.A.'s office. Smith spent a considerable amount of the time in the D.A.'s office on these cases. He met with McDonald ten or fifteen times and discussed details of the investigation with him in his capacity as the prosecutor.

After January, 1983, Smith provided his investigative information to the F.B.I. and a federal grand jury regarding the federal defendants. He knew the federal government was in-

vestigating them and he relayed this knowledge to McDonald. That investigation resulted in the indictments made the basis of the case at bar.

CANON 4

Canon 4 of the Texas Code of Professional Responsibility provides that a lawyer should preserve the confidences and secrets of a client. To disqualify an attorney under Canon 4, the movant must prove (1) the existence of a prior attorney-client relationship, and (2) a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary. *Duncan v. Merrill Lynch, Pierce, Fenner & Smith,* 646 F.2d 1020, 1028 (5th Cir. 1981). The client need not point to specific confidences; he need only show that the matters embraced within the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented him. *Ibid. United States v. Kitchin,* 592 F.2d 900, 903 (5th Cir. 1979). One a substantial relation is shown, the court will irrebuttably presume that relevent confidential information was disclosed during the former period of representation. *Duncan v. Merrill Lynch, Pierce, Fenner and Smith, supra. In re Corrugated Container Antitrust Litigation,* 659 F.2d 1341, 1346 (5th Cir. 1981).

The requirement of the existence of an attorney-client relationship between the D.A. and the D.P.S. has been established. The essential element of an attorney-client relationship is the engagement or consultation of a lawyer by a client for the purpose of obtaining legal services or advice. *Heathcoat v. Santa Fe International Corporation,* 532 F.Supp. 961, 964 (E.D. Ark. 1982). All that is required is that the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship. *Nolan v. Foreman,* 665 F.2d 738, 739 n.3 (5th Cir. 1982). The D.P.S. conferred with the D.A. with a view toward prosecution of the massage parlor defendants. The D.P.S. confided its investigation information to the D.A. which undertook legal action by indicting and prosecuting the defendants. No stronger case could be made establishing the existence of the attorney-client relationship.

The D.P.S. continues to assert its attorney-client privilege in these proceedings. This is sufficient to require consideration of the problem regardless of the fact that it is now the United

that a question is raised concerning the government's standing to raise the attorney-client question, this Court concurs with the *Vanflagg* opinion.

As for any question of timeliness, Smith learned of the conflict in October, 1984 and thereafter notified the Assistant United States Attorney. At a hearing on November 5th, the Court was made aware of a potential conflict by Assistant United States Attorney Bill Blagg, and the motion to disqualify was filed January 17, 1985. This issue is of such great significance as to excuse any delay in the filing of the motion. The attorney-client privilege has not been waived by the D.P.S. Additionally, this Court doubts there can ever be a waiver when the interests of the public, as hereinafter discussed, are at stake.

Having established the existence of an attorney-client relationship, the question becomes whether the matters embraced within the federal prosecution are substantially related to the matters concerned in the state prosecution. Though McDonald denies knowing any confidential information regarding the federal defendants, his knowledge of specific confidences is unnecessary before disqualification is warranted. *See, United States v. Kitchin, supra.* The evidence shows that Smith gave McDonald a complete overview of the entire investigation. The same investigative techniques were used in all of the massage parlor cases. The same group of witnesses were used throughout including a confidential informant. All of this was told to and known by McDonald in his capacity as a prosecutor and would not have been divulged to him otherwise. The name of the confidential informant involved in the case against the federal defendants and the name of a witness who will testify were made know to McDonald at that time. The fact that the state cases of the federal defendants were resolved prior to January, 1983, is of minimal significance. The investigation concerned all 33 defendants and all cases were intertwined. Whether or not McDonald and Smith discussed the specifics of defendant Stephen's case is also of little importance. McDonald knew about the federal investigation concerning the federal defendants which included defendant Stephens.

The Court finds that there is a substantial relation between

the state and federal matters. It is, therefore, presumed, and has in fact been shown, that relevant confidential information was disclosed during the former period of representation. The information made available to McDonald, which is most disturbing, is the identity of the confidential informant. The safety of this person is a valed concern of the D.P.S., and his name is not discoverable under ordinary circumstances. McDonald denies knowing who the formant is but he was the chief prosecutor of the massage parlor prostitution cases pending when he took office, he was briefed on numerous occasions concerning the D.P.S. investigation which concerned all defendants, and he had access to the list of all confidential informants. The Court cannot allow the existence of any possiblity of disclosure to any defendant herein of the informant's identity or any other confidential matter. McDonald must be disqualified under Canon 4.

CANON 9

Canon 9 admonishes that a lawyer should avoid even the appearance of professional impropriety. While there need be no proof of actual wrongdoing to justify disqulaification, there must be at least a reasonable possiblity that some specifically indentifiable impropriety did in fact occur. *Woods v. Covington County Bank,* 537 F.2d 804, 813 (5th Cir. 1976). *See, United States v. Snyder,* 707 F.2d 139, 145 (5th Cir. 1983). A court must also find that the likelihood of public suspicion or obloguy outweighs the social interests which will be served by a lawyer's continued participation in a particular case. *Ibid. See, United States v. Kitchin, supra,* at 903. Ethical consideration 9-3 provides that after a lawyer leaves public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving. For the reasons stated above, the Court finds that there is a reasonable possibility that some specifically identifiable impropriety did in fact occur. McDonald unquestionably had substantial responsibility in connection with the D.P.S. investigation and the state court prosecutions. The information made known to him as well as the information available to him creates a reasonable possibility of impropriety.

The second prong of *Woods* has also been met, and it is this

matter which is most troubling to the Court. McDonald was appointed Chief Deputy of the Bexar County Criminal District Attorney's Office. He swore to faithfully execute the duties of his office and to preserve, protect and defend the constitution and laws of the United States and of Texas. *See,* Tex. Const. Art. 16, Section 1. The public has a vital interest in seeing that criminal laws are enforced, and McDonald assumed a heavy responsibility of protecting this public interest. The duty a prosecutor owes to the public must be foremost, and this responsibility dies not disappear upon termination of public employment. He must remain constantly aware of and avoid any potential conflict between his public and private employment which could compromise the public interest.

This is not a situtation where McDonald just happened to be a member of the office which earlier prosecuted the person he now seeks to represent. Neither is it a situation where, in public employment he prosecuted the person on a matter different from that on which he now seeks to defend him. McDonald led the prosecution of several state massage parlor prostitution cases based on the same investigation, with the same witnesses, now being used to prosecute his client in federal court. He was privy as a prosecutor to information pertinent to the federal prosecution of his client, which information was divulged to him in trust. He was told, at the time he was a prosecutor, that a federal investigation concerning defendant Stephens and the same matters involved in state court was ongoing. The state and federal matters are more than substantially related, they are almost identical. McDonald's conflict is heightened by the fact that he now seeks to have the indictment herein dismissed because the federal defendants were the only massage parlor defendants prosecuted in federal court. To prove this, he has sought discovery of the investigative documents he had access to as a state prosecutor. McDonald had a substantial responsibility over the state prosecution as a protector of the public interest. To now permit him to defend a person in a case about which he gained valuable investigative information as a prosecutor, would provoke public suspicion and distruct of the judicial process. *See, United States v. Kitchin, supra,* at 905. The criminal justice system is widely criticized under normal circumstances. Permitting McDonald's representation of defendant Stephens

would add fuel to the fire.

Stephens' Sixth Amendment right to counsel does not include absolute right to cousel of choice. *United States v. Magee,* 741 F.2d 93,95 (5th Cir. 1984). It must yield to the higher interest of effective administration of the courts. *United States v. Kitchin, supra,* at 903. Stephens made no attempt to prove that McDonald's representation is essential to his defense. Nor has he shown any way he would be harmed by disqualification. Under the circumstances, the likelihood of public suspicion substantially outweighs the social interests served by McDonald's continued participation in this case. Canon 9 also requires that he be disqualified.

DISQUALIFICATION OF GUYER

Stephens has not argued that Guyer should remain even if McDonald cannot. McDonald and Guyer are law partners, and have both participated in Stephens defense from the outset. If a lawyer must withdraw under a disciplinary rule, no partner or associate may accept or continue such employment. DR 5-105(D). *See, United States v. Kitchin, supra,* at 904. Necessarily then, Guyer must also be disqualified.

CONCLUSION

The Court finds that Canons 4 and 9 of the Texas Code of Professional Responsibility require that Terrence McDonald and, his law partner, Ronald P. Guyer, be disqualified from further representation of defendant Stephens on the charges herein. The public interest served by disqualification far outweighs the private interest of Stephens in McDonald's representation. Public distrust of the justice system would be severely enhanced if courts condoned a situation in which there was even the appearance that a public employee used his position to further his or someone else's private interest. The responsibility assumed by McDonald and other public servants cannot be carelessly discarded once public service ceases. This Court is hopeful that he will reexamine other attorney-client situations, knowing how crucial this responsibility and duty to the public interest are. Should any other potential conflicts be discovered or arise, he is obligated to seriously consider

withdrawal from or denial of employment. Defendant Stephens will be given time to retain new counsel. At this time, the representation by McDonald and Guyer is terminated. Absent new facts or new law, reconsideration of this decision will not be entertained.

It is, therefore, ORDERED that Terrence McDonald and Ronald P. Guyer are DISQUALIFIED from further representation of defendant Stephens in this cause.

It is further ORDERED that defendant Stephens notify the United States District Cierk no later than March 15, 1985 of the name and address of his new counsel.

SIGNED this 12th day of February, 1985.

H.F. GARCIA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA
Plaintiff

VS. *

CAUSE NO. SA-84-CR-96(2) *

ROBERT MORRIS STEPHENS, JR. *
Defendant *

ORDER

On the 29th day of March, 1985, came on to be heard the government's motion to disqualify Vincent D. Callahan as attorney for defendant Robert Morris Stephens. On February 13, 1985, attorneys Terrence McDonald and Ronald P. Guyer, partners in the practice of law, were disqualified from representing Stephens based upon McDonald's involvement in state court as a prosecutor of Stephens in matters substantially related to this case. Callahan, though not a partner, is in the same law offices with McDonald and Guyer. The Court having considered the evidence is of the opinion the motion should be granted.

If a lawyer must withdraw under a disciplinary rule, no partner or associate may accept or continue such employment. Dr 5-105(D). *United States v. Kitchin,* 592 F.2d 900, 904 (5th Cir. 1979). Callahan is a solo practitioner who has been with McDonald and Guyer since September, 1984. He had previously practiced law with each of these lawyers in different offices at different times. Recently, McDonald, Guyer, Callahan and George Scharmen announced the relocation of their offices to 442 Dwyer Avenue in San Antonio. Callahan has a month-to-month lease and pay rent to McDonald and Guyer, which includes a receptionist, postage, photo copying, telephone, parking, secretary and library use. Guyer refers criminal cases and civil cases to Callahan, Guyer's first choice for referrals. While Callahan may pay a fee for the civil referrals, there is no such charge for the criminal cases. McDonald, Guyer and Callahan are good friends, and the latter two are partners in a piece of

land. There is a free flow of information in their office, and they assist each other on cases, as by appearing in court. After their disqualification, either McDonald or Guyer approached Callahan concerning representation of Stephens. The four men then met to discuss representation by Callahan. He has not discussed the facts of the case with McDonald, and only on a limited basis with Guyer, who testified that he has received no information from McDonald related to the latter's participation as a state court prosecutor. As pointed out in the first disqualification order, however, knowledge of specific confidences is unnecessary before disqualification is warranted. *Ibid.*

The Court believes that Callahan is sufficiently associated with McDonald and Guyer to require disqualification. The relationship between McDonald, Guyer and Callahan is such that permitting the latter to represent Stephens would frustrate the purpose served by the disqualification of McDonald and Guyer. Public suspicion would be inevitable under the circumstances, as would the appearance of impropriety. Callahan acknowledged his foremost responsibility to defend his client to the best of his ability, and admitted that he would accept any information from McDonald or Guyer, even if the information was obtained by McDonald while he was an assistant district attorney. The potential conflict is clear and requires disqualification. As before, Stephens made no attempt to prove that Callahan's appearance as his counsel is essential to his defense. Nor has he shown any way in which he would be harmed by disqualification.

To avoid any further problems, neither McDonald nor Guyer nor Callahan should participate in obtaining representation for Stephens other than to suggest to him the names of able attorneys who he can contact. The attorney chosen by Stephens should be advised by him to contact the Court prior to any communication with McDonald, Guyer or Callahan.

It is, therefore, ORDERED that Vincent D. Callahan is DISQUALIFIED from further representation of defendant Stephens in this cause. New counsel must notify the Court of his or her appearance no later than April 19, 1985.

Signed this 4th day of April, 1985.

H.F. GARCIA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA
Plaintiff

VS. *

SA-84-CR-96 (2) *

ROBERT MORRIS STEPHENS, III, *
Defendant

ORDER

Defendant has presented to the Court his motions to dismiss for selective and vindictive prosecution. A hearing was originally held February 14, 1985 as to the other defendants who adopted these motions. On October 16, 1985, the evidence from the prior hearing was adopted and considered by the Court in considering the motions of defendant Stephens. His testimony was also considered. Both motions contain the same allegations; i.e., that defendant is being prosecuted in federal court (with higher penalties than state court) because of his association with the Bandito Motorcycle Club, while other persons not so associated but otherwise similarly situated are not being prosecuted in federal court. While selective prosecution is a viable defense, the Court believes that vindictive prosecution is not. Cases considering vindictive prosecution have found due process violations if a defendant is penalized for exercising a procedural criminal right, such as demanding a trial or appealing. *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). *United States v. Krezdorn,* 718 F.2d 1360 (5th Cir. 1983). *Hardwick v. Doolittle,* 558 F.2d 292 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978). There is no allegation or proof that this defendant was so punished. The vindictive prosecution claim must be dismissed.

To prevail on a selective prosecution challenge, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not. *United States v. Jennings,* 724 F.2d 436, 445 (5th Cir. 1984), *cert. denied,* 104 S.Ct. 2682. *United*

States v. Greene, 697 F.2d 1229, 1234 (5th Cir. 1983), *cert. denied,* 103 S.Ct. 3542. If he meets this first showing, a defendant must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *United States v. Greene, supra.* Since there is a presumption that a criminal prosecution is undertaken in good faith, a defendant bears a very heavy burden in demonstrating invidious purpose which invades or overrides prosecutorial discretion. *Id,* at 1235. The mere exercise of some selectiveity by the government in instituting prosecutions is not in itself prohibited by the Constitution. *United States v. Hoover,* 727 F.2d 387, 389 (5th Cir. 1984).

Most of the facts here are not disputed. Defendant has been accused of engaging in the promotion of prostitution. He was among approximately thirty persons who were indicted in state court for violations of the Texas Penal Code. Almost all of the massage parlors, with which the state defendants were associated, accepted credit cards as payment for services. The acceptance of credit cards by defendant Stephens supplies the interstate commerce prerequisite to this federal prosecution. The government readily concedes that Stephens was selected because of his assoication with the Banditos. It is here that the parties diverge. Defendant claims he is being prosecuted only because of his association with a club which to many, is unorthodox and offensive, and whose members' lifestyle is distasteful. The government contends that the Banditos are an outlaw motorcyle gang deeply involved in organized crime activities.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 3423, 73 L.Ed.2d 1215 (1982). The Supreme Court in *Claiborne* noted, citing *Scales v. United States,* 367 U.S. 203, 229, 81 S.Ct. 1469, 1486, 6 L.Ed.2d 782 (1961), that a "blanket prohibition of association with a group having both legal and illegal aims" would present, "a real danger that legitimate political expression or association would be

impaired." The *Scales* Court suggested that to punish association with such a group, there must be "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' "*Ibid.* (quoting *Noto v. United States,* 367 U.S. 290, 299, 81 S.Ct. 1517, 1521, 6 L.Ed.2d 836 (1961)). The *Claiborne* Court also observed that the question whether an individual may be held liable merely by reason of association with others who committed unlawful acts is quite different from the question whether an individual may be held liable for unlawful conduct that he himself authorized or incited. 102 S.Ct. at 3430.

The evidence presented clearly establishes that defendant is not being prosecuted merely because of his association with an unpopular organization. The Federal Bureau of Investigation has accumulated information on what it designates as "outlaw motorcycle gangs." These gangs are considered the second highest priority in the investigation of organized crime, next to the Mafia. The organized crime activities in which the Banditos are suspected of engaging, involve the same crimes with which this defendant is charged. Agent Reagan Van de Loo of the F.B.I. testified that he received information, from informants, law enforcement officers, grand jury proceedings and his own investigation, that the Banditos were involved in various illegal activities. A high percentage of Banditos have criminal records. He learned that this defendant was operating a massage parlor where prostitution was being practiced with white slave traffic. Defendant's involvement with the Banditos was also made known. Many of the club members' "old ladies" prostituted at the massage parlor; the money received went to the Banditos. Persons in the hierarchy of the club's membership derive income form this source.

It is the organized crime activities of the Banditos and the involvement of this defendant therein which caused him to be prosecuted in federal court. Even the state investigation began with targeting of the Banditos and the Korean connection because they could by prosecuted under the state organized crime statute. This Court finds that the evidence is sufficient to establish that this defendant is being prosecuted because he specifically intended to accomplish the unlawful aims of the Banditos, and is not being prosecuted for merely associating

with others who have committed unlawful acts. Freedom of association cannot serve to prevent organized crime investigation and prosecution. *See, United States v. Rubio,* 727 F.2d 786, 792 (9th Cir. 1983).

As dicta to this decision, this Court expresses its strong reservations in the viability of selective prosecution as a defense to crime. If a person has committed a crime, in the sense that the government and a grand jury have reason to believe he has, he should face the consequences of his actions regardless of the treatment of others similarily situated. It seems baffling to contend that an alleged criminal has been denied equal protection of the law simply because others who have committed the same crime have not been prosecuted. The good fortune of those who have not been prosecuted can hardly be attributed to "protection of the law" or a legitimate state interest. The reason behind the decision to prosecute should have no significance, assuming of course there is an evidentiary basis to obtain an information or an indictment. If a person has broken the law, he should be prosecuted without concern for prosecutorial motivation.

Of course, selective prosecution cannot be sanctioned. Any prosecutor who singles out an individual for prosecution for what otherwise would be considered impermissible reasons should himself be punished for violating his oath and public responsibility in not pursuing all known, similarly situated criminals. But a person who is "lucky" enough to be selectively prosecuted should not escape the consequences of his actions because of the government's selectivity. It is this Court's humble opinion that selective prosecution should not be a defense to crime.

It is, therefore, ORDERED that defendant's motions to dismiss for selective and vindictive prosecution are DENIED.

SIGNED this 18th day of October, 1985.

H.F. GARCIA
UNITED STATES DISTRICT JUDGE